

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CAROLYN D. CLARK
Claimant

VS.

CUSTOM CAMPERS, INC.
Self-Insured Respondent

)
)
)
)
)
)
)

Docket No. 1,032,979

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 23, 2009, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on July 22, 2009. Michael R. Lawless, of Lenexa, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) denied claimant's request for workers compensation benefits, finding that she failed to meet her burden of proving a compensable work injury.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument before the Board, the parties agreed that claimant's gross preinjury average weekly wage was \$554.15. The parties further agreed that in the event the Board reverses the ALJ's finding that claimant failed to prove she suffered personal injury by accidents arising out of and in the course of her employment with respondent, then the Board should decide all remaining issues not decided by the ALJ rather than to remand the matter to the ALJ for a determination of those issues.

ISSUES

Claimant requests review of the ALJ's finding that she failed to prove she sustained personal injuries by a series of accidents that arose out of and in the course of her employment with respondent. If the Board reverses the ALJ on this issue, claimant requests the Board also find that she gave respondent timely notice of her accidents and that she suffered a 25 percent impairment to her right upper extremity at the level of the shoulder and a 25 percent impairment to her left upper extremity at the level of the

shoulder. Claimant further requests that the Board enter an order requiring respondent to furnish her with additional medical treatment and temporary total disability benefits.

Respondent requests that the Board affirm the Award of the ALJ. In the event the Board finds that claimant suffered a compensable injury or injuries, respondent requests the Board adopt the opinion of Dr. David Black and find that claimant had no functional impairment. Respondent specifically argues that claimant did not prove she suffered injuries to or an impairment of her shoulders. Therefore, in the event the Board awards claimant any impairments, respondent requests that it should average the impairment ratings of the physicians related to only claimant's lateral epicondylitis and award the claimant 5 percent to each upper extremity at the level of the arm. Respondent also contends that claimant failed to provide it with timely notice of her accidental injuries.

The issues for the Board's review are:

- (1) Did claimant suffer injuries as a result of a series of accidents that arose out of and in the course of her employment with respondent? If so,
- (2) What is her date of accident for purposes of notice?¹
- (3) What is the nature and extent of claimant's impairment?
- (4) Is claimant entitled to additional medical treatment, future medical treatment, or future temporary total disability compensation?

FINDINGS OF FACT

Claimant was employed as a cabinet maker at respondent, a company that builds travel campers. As part of claimant's job, she built cabinets, bed frames and closet dividers. She described her job as repetitively gripping, grasping, sorting and picking up items for eight hours a day. Her last day of employment was August 24, 2006, when she was laid off because of production cuts.

Claimant developed problems with her bilateral upper extremities in 1999, and respondent sent her to Dr. David Black, a board certified orthopedic surgeon. Dr. Black performed bilateral carpal tunnel release surgeries in 1999 and 2000. He released claimant from care for her carpal tunnel conditions on August 21, 2000. He rated her permanent partial impairment at 5 percent to her right and left upper extremities. When

¹ The parties stipulated to an ending date for the alleged series of accidents of August 24, 2006. ALJ Award (Mar. 23, 2009), Stipulation 2, pg. 2; R.H. Trans. at 4.

he released claimant from treatment in August 2000, she was still complaining of tingling in the little finger of her hand, and he diagnosed her with probable mild ulnar neuropathy.²

Claimant testified that after her carpal tunnel release surgeries, she developed tendinitis in both her arms and elbows. She said that at the time of the settlement of her workers compensation claim for her bilateral carpal tunnel conditions, it was agreed that her arm and elbow problems would be excluded from the settlement and dealt with later. She said she complained to respondent about the problems with her arms and elbows almost daily up to her last day of work.

A memo from respondent to its third party administrator dated March 22, 2001, indicated that claimant reported to her supervisor that she woke up that morning with tingling, burning and spasms in her left hand and arm that started at her fingers and went to her shoulder. Claimant told her supervisor she was going to make an appointment with Dr. Robert Thomen on her own, and she also said the problems were from her previous carpal tunnel condition and a pinched nerve in her neck. The memo indicated that claimant told her supervisor that the pinched nerve in her neck was not work related. An addendum to the memo of March 23 indicated that claimant told respondent that Dr. Thomen suggested that since claimant was going to be seen by Dr. Black the next month, she should report her complaints of burning and tingling to him.

Respondent sent claimant to Dr. Black on April 9, 2001. She complained of pain in her elbows that radiated down into her forearms and occasionally her hand. She also complained of tingling in her little fingers of both hands. Upon examination, Dr. Black found she had tenderness over the lateral part of the elbow, but the remainder of her examination was normal. She had no swelling of her elbow. Her ulnar nerve examination was normal, other than the tingling in her little fingers. She had some mild hand swelling but had no tenderness in her hands. Dr. Black fitted claimant with some tennis elbow straps and restricted her from using a screw gun, lifting more than five pounds, and repetitive work.

Claimant returned to see Dr. Black on June 14, 2001. She was getting along better since being off the screw gun. She only had some occasional discomfort in her elbow, some occasional tingling in her fingers, and some tenderness in her elbows. Her examination was otherwise normal. Dr. Black believed she had reached maximum medical improvement from her elbow conditions. Claimant called him in August 2001 and asked about a rating on her elbows, and he told her she had no permanent impairment for her elbows but only had the 5 percent impairment for her bilateral carpal tunnel syndrome.

Dr. Black next saw claimant on January 23, 2003. She had been having more trouble with her elbow, and respondent sent her to him for an evaluation. Claimant had not

² Dr. Black did not identify which hand claimant was referring to.

been wearing her braces and was having difficulties with some grasping and lifting. Her pain was again at the outside of her elbow, primarily her right elbow. He asked her to go back to using the tennis elbow straps and prescribed some medication. He saw her again on March 26, 2003, and she was still complaining of pain on the outside of her elbow. They discussed injections, but she declined that treatment.

Dr. Black saw claimant again on February 9, 2005, at which time she was complaining of spasms in both elbows. The left was bothering her more than the right. Dr. Black's examination showed that she had tenderness on the medial side of her elbow. She had no effusion and had full range of motion. She had no pain with resisted dorsiflexion of her elbow and no pain on palmar flexion. Dr. Black allowed claimant to continue at her regular duty with the continued restriction of not using the screw gun. He told her to return if she needed to, but he has not seen her since February 2005.

Dr. Black testified that claimant did not demonstrate positive findings that would suggest radial nerve entrapment during the time he was treating her. She did not make any complaints to him from August 2000 to February 2005 that her work at respondent was causing her problems with her shoulders.

Dr. Black testified that based on the AMA *Guides*³ and on his examinations of claimant through February 9, 2005, he believed that claimant had 0 percent impairment of function to her elbows.

Dr. Black said that if claimant was not employed anywhere for six months and still continued to have tendinitis, he would probably treat her again, possibly with injections. However, ultimately he would expect her problems to resolve without a permanent impairment.

Claimant did not work for work for about six months after her termination from respondent in August 2006. She said her condition did not improve during that period of time. In March 2007, she became employed as a cook for U.S.D. 413. As such, she is in charge of the main meat dish and one vegetable dish. She described her job as opening boxes of food, placing the food on pans, putting the pans in the oven, and then moving the pans of cooked food into a warmer. She also helps serve the food. She said she does not consider her work at the school to be repetitive in comparison to her work at respondent.

Dr. P. Brent Koprivica is board certified in emergency medicine and preventative and occupational medicine. He examined claimant on May 9, 2007, at the request of claimant's attorney. She told him she had developed bilateral carpal tunnel syndrome and had surgeries in 1999 and 2000. As she continued to work, she started having other problems

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

in her medial and lateral elbows and both shoulders. She said her ring and little fingers went to sleep and she was awakened at night with numbness and pain. She complained of posterior bilateral shoulder girdle pain and said she gets spasms in her shoulder and elbow areas.

Upon examination, Dr. Koprivica found that claimant had greater strength loss on the left than the right. She had no intrinsic atrophy in either hand, which told him that she did not have a severe ulnar neuropathy. Her two-point discrimination was preserved and she had no evidence of RSD. Her pinch strength was reduced from what he would expect in someone who does manual work. She had some provocative findings for carpal tunnel syndrome on both sides, but he did not associate that with this claim. Dr. Koprivica found claimant's palmar flexion and dorsiflexion to be normal. Her ulna deviation and radial deviation was normal. In testing the range of motion in claimant's forearm and elbow, her forearm supination was normal in both arms, and pronating her elbows was normal on both sides. The range of motion in both of her elbows was normal and without any loss. He found no atrophy in any of the muscles of her upper extremities. She had positive findings for radial tunnel syndromes bilaterally. Forced elbow flexion was provocative for cubital tunnel syndrome bilaterally. Tinel's testing was positive overlying the medial elbow bilaterally. She had paresthesias into the ring and little fingers of both hands. She had medial and lateral epicondyle pain in both elbows. She had significant bilateral shoulder girdle pain. Hawkins' impingement testing was positive bilaterally. She had loss of range of motion in her shoulders.

Dr. Koprivica diagnosed claimant with bilateral lateral epicondylitis, bilateral radial tunnel syndrome, bilateral medial epicondylitis with cubital tunnel syndromes, and bilateral shoulder impingement syndromes with loss of motion, which he attributed to her exposure to risk through her last day of exposure at respondent on August 24, 2006.

Dr. Koprivica found that claimant was at maximum medical improvement for non-operative management. He did not think surgery was mandatory at the time he saw her. He said her condition was not going to progress without further exposures, she had removed herself from the risk, and her conditions were more mild in nature. He also believed that treatment of her shoulders with subacromial steroids and therapy would be appropriate. If that did not relieve her symptoms, she would be a potential candidate for subacromial decompression.

Dr. Koprivica rated claimant's impairments, using the *AMA Guides*, as follows: for chronic bilateral lateral epicondylitis and mild radial tunnel syndrome, 10 percent of her upper extremities bilaterally; for chronic medial epicondylitis and ulnar neuropathy of the medial elbow, 10 percent of her upper extremities bilaterally; for her combined shoulder impairments, 7 percent to her right upper extremity impairment and 8 percent to her left upper extremity impairment. Using the Combined Values Chart, Dr. Koprivica found that claimant has an overall combined impairment of 25 percent to her right upper extremity at

the level of the shoulder and 25 percent to her left upper extremity at the level of the shoulder.

Dr. Koprivica agreed that nerve conduction studies conducted by Dr. Komes in March 2005 indicated that claimant had no ulnar nerve entrapment in either extremity. His diagnosis of ulnar nerve entrapment at the elbow was based on his clinical examination and claimant's complaints of intermittent numbness in a portion of her ring fingers and her little fingers. He said there were no objective findings or diagnostic testing which would support a finding of nerve entrapment.

Dr. Koprivica said that radial tunnel and lateral epicondylitis would be aggravated by pronation and wrist extension against resistance. He said that claimant's activities in the cafeteria in serving food, where she would be required to use grasping tools and would scoop and serve food onto plates, would be motions he would expect to generate symptoms in her lateral epicondylitis and radial tunnel problems.

In response to a request from claimant's attorney, Dr. Koprivica authored a supplemental report dated April 4, 2008, in which he stated that there was no objective information to suggest that claimant's C-7 radiculopathy was aggravated by her work activities. Therefore, he stated he could not provide support for any additional impairment above that which he previously assigned to claimant's upper extremities.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵

⁴ K.S.A. 2008 Supp. 44-501(a).

⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁶

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2008 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as

⁶ *Id.* at 278.

a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

ANALYSIS

The ALJ listed only one issue: "Did Claimant meet with personal injury by accident arising out of and in the course of her employment with the Respondent?"⁷ The ALJ then made the finding that "Claimant has not met her burden to establish a compensable work injury and denies the claim on that basis."⁸ He further determined that claimant was not entitled to an award of compensation. However, he did so on the basis of claimant not proving a permanent impairment because too much time had passed between claimant's last day of work for respondent and her examination by Dr. Koprivica.

The Court finds that the Claimant has failed to meet her burden in showing any permanent impairment due to her work with the Respondent. In the Court's opinion, there is too much time between the February 9, 2005 visit to Dr. Black which his opinions are based on, and the May 9, 2007 to Dr. Koprivica to attribute her condition to work activity with the Respondent. The Claimant had already acquired a new job with the school district by that time.⁹

The Board agrees with the conclusion that claimant has failed to prove a permanent impairment and therefore is not entitled to an award of permanent partial disability compensation. The Board further agrees that too much time had passed to attribute all of Dr. Koprivica's findings to claimant's employment with respondent. But the Board disagrees with the finding implicit in the ALJ's denial of all benefits that claimant did not

⁷ ALJ Award (Mar. 23, 2009) at 2.

⁸ *Id.* at 3.

⁹ *Id.*

meet with personal injury by accident arising out of and in the course of her employment with respondent. To the contrary, even respondent's expert and authorized treating physician, Dr. Black, diagnosed claimant with bilateral tendinitis and epicondylitis. Dr. Black, however, disagreed with Dr. Koprivica as to whether those conditions were permanent and whether those conditions were rateable under the *AMA Guides*. Furthermore, Dr. Black did not diagnose claimant with the other conditions diagnosed by Dr. Koprivica. The Board finds Dr. Black, who was claimant's treating physician for six years, to be more credible than Dr. Koprivica in this regard. Even Dr. Koprivica acknowledged that claimant's negative EMG, lack of objective findings, and subsequent work activities contradicted some of his diagnoses and causation opinions.

Accordingly, the Board finds claimant suffered bilateral tendinitis and epicondylitis injuries to her bilateral upper extremities (elbows) by a series of accidents that arose out of and in the course of her employment with respondent, but that these conditions did not result in a rateable permanent impairment of function. As a result, claimant's award is limited to her past medical treatment.

As for notice, claimant clearly complained to respondent regarding her upper extremity symptoms and was sent to Dr. Black by respondent for authorized medical treatment well before her last day of work for respondent. There is no proof that any of the triggering events listed in K.S.A. 2008 44-508(d) occurred before claimant's last day worked or before the dates when claimant gave respondent verbal notice. Therefore, claimant's date of accident could not have been before August 24, 2006. Because claimant gave notice before August 24, 2006, notice was timely.

CONCLUSION

(1) Claimant suffered personal injury by a series of accidents that arose out of and in the course of her employment with respondent.

(2) Claimant suffered a series of accidents each and every working day through her last day worked on August 24, 2006. Based upon all the evidence and circumstances, this is claimant's date of accident for purposes of giving notice.

(3) Claimant has no rateable permanent impairment of function and is not entitled to an award of permanent partial disability compensation.

(4) Claimant has not proven that she is in need of additional medical treatment as a direct result of her work with respondent. Claimant is entitled to future medical treatment upon application to and approval of the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated March 23, 2009, is reversed, and claimant is awarded her past authorized medical treatment expenses and future medical upon application.

IT IS SO ORDERED.

Dated this _____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Self-Insured Respondent
Thomas Klein, Administrative Law Judge